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Supreme Court, U.S.
FILED
FEB 8 1995
OFFICE OF THE CLERK

NO. 94-1165

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

STANISLAW R. BURZYNSKI, M.D., Ph.D.

Petitioner

vs.

TRUSTEES OF THE NORTHWEST LAUNDRY AND DRY CLEANERS HEALTH & WELFARE TRUST

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S SUPPLEMENTAL AND REPLY BRIEF

RICHARD A. JAFFE, Esq.
1710 Summit Tower
Eleven Greenway Plaza
Houston, TX 77046
(713) 871-2014
FAX (713) 965-2130

Attorney for Petitioner

SUPPLEMENTAL MATTER

Texas State Court Overturns Medical Board's Decision

On February 3, 1995, Texas State District Judge Paul Davis sitting in the 200th District Court in Travis County rendered a decision from the bench reversing the Medical Board's Order that it was illegal for Dr. Burzynski to use his non-FDA approved treatment in the State of Texas.[1] Judge Davis found that the Board's Order was (1) in violation of constitutional or statutory provisions, (2) arbitrary and capricious, and (3) affected by other error of law.

As is the practice in Texas state courts, Judge Davis directed undersigned counsel, as the prevailing party, to prepare a short order for his review. Judge Davis indicated that he has not decided whether he will issue a written opinion. It is unlikely that there will be a written order prior to the scheduled certiorari conference date.

Judge Davis is now the second Texas state judge to rule that Dr. Burzynski's use of his medications is and always was legal. And yet both federal courts in this case allowed summary

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1 Judge Davis also reversed the Board's decision that Dr. Burzynski violated the advertising provision of the Texas Food Drug and Cosmetics Act, but that issue is not implicated in this case.

judgment because Dr. Burzynski allegedly defrauded the Respondent by not advising it that his treatment was illegal in Texas. There is a direct conflict between the federal courts and the Texas state court. Petitioner urges this Court to at least hear the case and decide whether the lower federal courts improperly interfered with the state judicial process.

REPLY

Petitioner wishes to correct several misstatements contained in Respondent's Brief.

1. Respondent asserts that the Medical Board's licensing case was commenced "long after" the federal district court granted summary judgment in late 1992. (See Respondent's Brief at page 3.) This is incorrect. The medical licensing case was commenced in August 1988. Based its inaccurate time sequence, Respondent incorrectly argues that the "subsequently" filed medical board case is no reason for a federal court to abstain from deciding this "previously" filed federal case.

In any event, the previously filed medical board case was *the* proceeding by which the legality of Dr. Burzynski's treatment was to be determined. Thus, Respondent's analogy to concurrent federal and state bank robbery prosecutions (for different banks) is not analogous, and its attempt to deny or downplay the logical relationship between the two cases is unpersuasive.

2. Respondent claims that Petitioner did not raise

abstention prior to the appeal. (Respondent's Brief at page 4). This is incorrect. In opposition to Plaintiff's Motion for Summary Judgment, Petitioner suggested that abstention may be appropriate if the district court was considering making a ruling on Texas law. However, Petitioner argued that the district court did not have to make a ruling on Texas law.

In his Motion to Reargue submitted to the district court, Petitioner urged the court to rescind its ruling on Texas law because of the pending state court proceedings.

In any event, abstention is not a waivable argument, and a court may abstain *sua sponte, Bellotti v. Baird,* 428 U.S. 132, 49 L.Ed.2d 844, 96 S.Ct. 2857 (1976), *Muskegon Theatres, Inc. v. Muskegon*, 507 F.2d 199 (6th Cir.1974), even on appeal *AFA Distributing Co. v. Pearl Brewing Co.*, 470 F.2d 1210, (4th Cir. 1973).

3. Respondent incorrectly characterized the Texas Administrative Law Judge's decision as being related to burden of proof. (Respondent's Brief at page 3). Administrative Law Judge Corbitt made it abundantly clear that in his opinion, as a matter of law, it is and always was legal for Dr. Burzynski to use his medications. The Medical Board's decision reversing Judge Corbitt stated that it was illegal for Dr. Burzynski to use his medicine on patients, which decision has itself been reversed. Therefore, it mischaracterizes the state proceedings for

Respondent to argue that the administrative law judge's decision relates only to burden of proof.

4. Respondent argues that there is nothing to suggest that the Medical Board was aware of this case. (Brief at pages 6-7). In fact, the Medical Board's counsel submitted both decisions to each board member for their consideration, and argued that the federal courts' decisions were persuasive but not binding authority. At the Board meeting, board members questioned Judge Corbitt closely on the validity of his decision, in light of the federal court decisions.

CONCLUSION

As of the date of this Brief, the law in Texas is that it is legal for Dr. Burzynski to use his medicine on patients. For this reason, the lower federal courts' holding that Dr. Burzynski committed fraud, as a matter of law, by not revealing that his treatment was illegal in Texas is untenable.

More importantly, the decisions of the lower federal courts improperly interfere with Texas sovereignty, violate principles of comity, and certainly deserve this Court's attention.

Respectfully Submitted,

RICHARD A. JAFFE, Esq.
1710 Summit Tower
Eleven Greenway Plaza
Houston, Texas 77046
(713) 871-2014
PETITIONER'S ATTORNEY